CHAN T'SHIAO LI & ANOR v. MALCOM FERNANDEZ & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMONS NO: WA-22NCVC-28-01-2023]
27 NOVEMBER 2023

Abstract – *An administrator pendente lite or an administrator pending litigation is appointed by the court in order to preserve the assets of the estate of the deceased while the dispute as to the validity of the will is pending determination of court. It is imperative that the administrator pendente lite is a neutral person, in order to ensure the neutrality and checks and balances in decision-making process.*

SUCCESSION: *Probate – Will – Application for appointment of administrators pendente lite pending resolution of dispute over validity of will – Whether appointment necessary to deal with claims against estate and to preserve assets of estate – Whether in interest of executors and beneficiaries of estate – Whether appointment of neutral person would ensure neutrality and checks and balances in decision-making process – Whether bond should be imposed – Whether fees payable to administrators pendente lite – Probate and Administration Act 1959, s. 19 – Rules of Court 2012, O. 72 r. 18*

The defendants, the executors of the will of the deceased, sought the appointment of *administrators pendente lite* to administer the estate of the deceased and certain ancillary orders, pending the court resolution of a dispute over the validity of the impugned will of the deceased with the plaintiffs, the daughters of the deceased. The notice of application for the appointment of *administrators pendente lite* was made pursuant to s. 19 of the Probate and Administration Act 1959 ('PAA') and/or O. 72 r. 18 and/or O. 92 r. 4 of the Rules of Court 2012 ('ROC') and/or pursuant to the inherent jurisdiction of the court. The issues that arose for the court's determination were: (i) whether the court should appoint *administrators pendente lite*; (ii) if yes, who should the court appoint as *administrators pendente lite*; (iii) whether the appointed *administrators pendente lite* were required to give security or administration bond; if yes, how much should the court set as the bond; (iv) how should the court set the fees payable to the appointed *administrators pendente lite*; and (v) should the court grant prayer 3(b) of encl. 12 as framed.

Held (allowing application in part):

(1) The plaintiff's writ action was essentially to challenge the validity of the impugned will. Pending the trial of the writ action, it was necessary to deal with claims against the estate and to preserve the assets of the estate and such preservation will pre-eminently be achieved by the appointment of *administrators pendente lite*. The appointment of

A *administrators pendente lite* was not only proper, but necessary in the interest of the plaintiff, the defendants as well as the beneficiaries of the estate. (paras 40, 41 & 43)

(2) The court should appoint a neutral person to be the *administrators pendente lite*. Unless there is a good reason, a person who is an executor B of a disputed will, a beneficiary or a person who has an interest in the assets of the estate or is a litigant in the probate litigation should not be appointed as the *administrators pendente lite*. The plaintiffs or the defendants could not and should not be appointed as the *administrators pendente lite* as they were not neutral parties in the writ action. Hence, C in order to ensure neutrality and checks and balances in the decision-making process, one nominee each from the two camps were appointed, *ie*, the defendants' nominee, Dato' S Satharuban, an advocate and solicitor, and the plaintiffs' nominee, Khoo Siew Kiat from Deloitte Restructuring Services PLT. In the event the two *administrators pendente* D *lite* could not agree on any issue, they may apply to court for directions. (paras 51 & 55-58)

(3) A bond should not be imposed. Such a requirement is not stated in s. 19 of the PAA, which applies to *administrators pendente lite*, unlike s. 35 of the PAA which applies to administrators. (para 67)

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(4) The fees payable to the appointed *administrators pendente lite* is provided in O. 72 r. 20 of the ROC. The *administrators pendente lite* shall produce at the Registry an account of the money and other property received or paid or otherwise dealt with by them in their capacity as *administrators pendente lite*. The account shall be examined by the Registrar who shall F give such directions as may be necessary for the examination of the *administrators pendente lite*'s costs. The Registrar shall, on the completion of the examination of their account, and taxation of their costs, assess and provide for the *administrators pendente lite*'s remuneration. (paras 70 & 71)

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(5) Prior to her death, the deceased had financed various companies and properties. The defendants thus, in prayer 3(b) of encl. 12, *inter alia*, contended that the appointed *administrators pendente lite* should continue to make payments out of the estate to settle the debts of these companies and/or properties and provide for their operations, costs and expenses. H In other words, the court was urged to lift the corporate veil to treat the companies and properties as part of the estate of the deceased. A company is a separate legal entity in law and the liability of a company is not the liability of its members, shareholders or directors. Whether or not the estate should continue the alleged practice of the deceased was I a decision best left to the appointed *administrators pendente lite*. It was not in the interests of the estate or beneficiaries that the court gives a blank cheque to settle these debts or statutory charges. Therefore, prayer 3(b) of encl. 12 was granted in a modified form. (paras 73, 74 & 77-79)

Case(s) referred to:

ARL Associates Sdn Bhd & Ors v. Bank Kerjasama Rakyat Malaysia Bhd [2012] 1 LNS 821 CA ***(refd)***
Fazio v. Naso [2016] WASC 385 ***(dist)***
Hempseed v. Ward & Anor [2013] QSC 348 ***(refd)***
Lai Fee & Anor v. Wong Yu Vee & Ors [2023] 4 CLJ 1 FC ***(refd)***
Noraini Omar & Anor v. Rohani Said & Another Appeal [2006] 1 CLJ 895 CA ***(refd)***
Re Griffin [1925] Probate Division 38 ***(refd)***
Re Yeow Chow Beng [1998] 3 CLJ 141 HC ***(refd)***
Sara Yasmin Sekh Mohd Ruzi v. Hamaludin Ali & Ors [2022] 1 LNS 619 HC ***(refd)***
Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2) [2021] 1 CLJ 391 CA ***(refd)***
Tan Poh Lee v. Tan Boon Thien & Anor [2019] 1 LNS 2300 HC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***

Legislation referred to:

Probate and Administration Act 1959, ss. 19, 35
Rules of Court 2012, O. 71 rr. 37(14), 38, O. 72 rr. 18, 20, O. 92 r. 4

For the plaintiffs - V Sithambaram & Ruebankumar; M/s Sitham & Assocs
For the 1st defendant - Cecil Abraham, Avinder Singh Gill, Rishwant Singh, Mohd Irwan Ismail & Chia Eng Yi; M/s Avinder Gill Chambers
For the 2nd defendant - Ong Yu Jian & Nurul Hanani Azamuddin; M/s Raj, Ong & Yudistra

Reported by S Barathi

JUDGMENT
(encl. 12)

Leong Wai Hong JC:

Introduction

[1] The defendants apply to me for the appointment of *administrators pendente lite* to administer the estate of Lim Siew Kim, deceased ("deceased") and for certain ancillary orders. (See encl. 12 notice of application dated 13 April 2023).

[2] The term *administrator pendente lite* is Latin for "administrator pending litigation". Such a person is appointed by a court to manage a deceased's assets until the dispute over the deceased's will is resolved by the court.

[3] The defendants who are executors of the will of the deceased dated 28 April 2022 ("impugned will") urged me to grant their application urgently as decisions are required to manage the assets pending court resolution of a dispute over the validity of the impugned will with the plaintiffs. In the supporting affidavit encl. 13 exhs. L-11 and L-19 and from paras. 35 to 36.2.3, the defendants have set out details of funding that they say is urgently required to be paid out from the estate of the deceased.

[4] The estate of the deceased is huge by any standards. The plaintiffs say the estimated value of the estate is about RM1.6 billion. The defendants say "if we accept the plaintiffs' valuation of the estate at RM1.6 billion and the will is disproved, then the plaintiffs, together, stand to gain approximately RM799 million." (See encl. 29 para. 3.6 and encl. 33 para. 66).

[5] However, I should point out that the impugned will of the deceased has a "no contest clause". Such a clause provides that if a beneficiary challenges the will or any of its provisions, the beneficiary forfeits what he or she would have received under the will. Such a beneficiary is "*in terrorem*" (in fear) of challenging the will lest he or she forfeits his or her inheritance.

[6] A copy of the impugned will dated 28 April 2022 can be seen in encl. 13 exh. L-5. The bulk of the estate goes to a foundation called Dikim Foundation (70%) and to a son by the name of Marcus Chan Jau Chwen (30%).

The Parties

[7] The deceased is a daughter of the late tycoon Tan Sri Lim Goh Tong, the founder of the Genting Group of companies. She is also the wife of the late Mr Dick Chan Teik Huat of the accounting firm known as Kassim Chan & Co (now Deloitte).

[8] The first plaintiff Chan T'shiao Li and the second plaintiff Kimberley Chan T'shiao Miin are the second and third children (daughters) respectively of the deceased.

[9] The first defendant Malcolm Fernandez of Messrs C Sukumaran & Co is a lawyer who for many years acted for the deceased and various companies controlled by the deceased. The second defendant, Chan Mei Yee, is the personal assistant of the deceased for many years.

[10] Both defendants are executors named in the impugned will. They are not family members of the deceased.

[11] The plaintiffs are represented by Messrs Sitham & Associates of No. 4-B, Brown Road, 10350, Penang. The two defendants were initially represented by Messrs Avinder Gill Chambers of F-1-11, First Floor, Block F, Pusat Komersil Jalan Kuching, No. 115, Jalan Kepayang, Off Jalan Kuching, 51200 Kuala Lumpur.

[12] After the first hearing on 18 September 2023, the second defendant changed her solicitors to Messrs Raj, Ong & Yudistra at Suite 50-4-13 & Suite 50-4-12, 4th Floor, Wisma UOA Damansara, Jalan Dungun, Damansara Heights, 50490, Kuala Lumpur. The first defendant continued to be represented by Messrs Avinder Gill Chambers.

Issues Before Me

[13] The issues before me are:

(i) whether I should appoint *Administrators Pendente Lite*?

(ii) if yes, who should I appoint as *Administrators Pendente Lite*?

(ii) whether the appointed *administrators pendente lite* are required to give security or administration bond? If yes, how much should I set as the bond?

(iv) how should I set the fees payable to the appointed *Administrators Pendente Lite*? and

(v) should I grant prayer 3[b] of encl. 12 as framed?

Court Proceedings Between Parties

[14] There are two court actions between the parties. They are:

(i) KLHC Civil Suit No: 22NCVC-28-01/2023 ("writ action");

(ii) KLHC Originating Summon *Ex-Parte* No: WA-32NCVC-3189-10/2022 ("probate action").

[15] The probate action was filed by the defendants to obtain the grant of probate of the impugned will.

[16] The second plaintiff has filed a caveat pursuant to O. 71 r. 37(14) and r. 38 of the Rules of Court 2012 to prevent the grant of probate. The probate action is consequently deemed contested. (See: *Re Yeow Chow Beng* [1998] 3 CLJ 141 Augustine Paul JC).

[17] The High Court, on 30 January 2023, has ordered that both the probate action and the writ action be heard together. The probate action was subsequently withdrawn by the defendants without prejudice to the writ action.

[18] The plaintiffs' writ action is essentially to challenge the validity of the impugned will, on the grounds, *inter alia*, that the deceased lacked testamentary capacity, the existence of suspicious circumstances and the exertion of undue influence on the deceased in the making of the impugned will.

[19] I have fixed trial of the writ action to be held on 19 February 2024 to 22 February 2024 with additional trial dates in March and April 2024.

A **Defendants' Court Application For *Administrators Pendente Lite* (Enclosure 12)**

Defendant's Case

[20] Pending trial of the writ action, the defendants filed a notice of
B application (encl. 12) pursuant to s. 19 of the Probate and Administration Act 1959 ("PAA") and/or O. 72 r. 18 and/or O. 92 r. 4 of the Rules of Court 2012 and/or pursuant to the inherent jurisdiction of this Honourable Court, for the appointment of *administrators pendente lite* to administer the estate of the deceased and for certain ancillary orders.

C **[21]** I would like to point out that the directions and prayers for encl. 12 which are reproduced in encl. 27 submissions of the defendants are inaccurate as the reproduction omitted prayers 1, 2, 11 and 12.

[22] I reproduce below the accurate encl. 12 which asked for the following orders:

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(i) that the defendants/applicants herein, Malcolm Fernandez (NRIC No: 711030-10-6297) and Chan Mei Yee (NRIC No: 751003-14-5238) be jointly appointed *administrators pendente lite* of the estate of Lim Siew Kim, deceased (NRIC: 481024-10-5502) ('the deceased'),
E without giving any security and/or providing an Administration Bond pending the determination of this probate action above or pending any further order of this Honourable Court;

(ii) alternatively, that Dato Satharuban Sivasubramaniam, an Advocate and Solicitor of the High Court of Malaya and Tan Chil Kin, a
F chartered accountant, an approved auditor and liquidator, be jointly appointed *administrators pendente lite* of the estate of Lim Siew Kim, deceased (NRIC: 481024-10-5502) ('the deceased'), without giving any security and/or providing an Administration Bond pending the determination of this probate action above or pending any further
G order of this Honourable Court;

(iii) that the following directions be made as to the administration of the estate pending the determination of this probate action to preserve the estate and all its assets and liabilities, namely that the *Administrators Pendente Lite*, their servants and or agents shall:

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(a) receive and manage the assets and liabilities of the estate, but not to distribute any assets or proceeds therefrom to any of the beneficiaries of the estate of the deceased pending the determination of this probate action and or further order of this Honourable Court;

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(b) collect, receive and place monies currently held in various bank accounts in Malaysia in the name of the deceased, whether in current accounts or fixed deposits or savings accounts as identified in this application and affidavit in support herein, and to place the same in a joint current account of the *Administrators Pendente Lite*, such account to be identified to be held as trustees of the estate of the deceased, Lim Siew Kim, with instructions that all *Administrators Pendente Lite*, shall, at all times consent and approve, payments to be made out of this account jointly for the sole purpose of financial support to estate companies and/or properties on a needs be basis (hereinafter referred to as 'the trust account');

(1) to file an affidavit every 30 days to provide an account of all monies withdrawn from the said trust account and to explain the purpose and quantum of such payments;

(2) to identify and pay, from the trust account, all lawful debts and expenses, identify all creditors and enter into any compromise or settlement with the creditors towards achieving a beneficial outcome for the estate of the deceased and to maintain a record of the same and to obtain receipts from the payees of such payments;

(3) upon payment or settlement of all creditors and upon setting aside a sum for monthly expenses or exigencies of all monies usually paid by the deceased, to place the balance of the sums in a joint single or any number of fixed deposit account(s) with strict condition that any dealing or instructions in the same requires both *administrators pendente lite* to sign jointly as trustees of the estate of the deceased;

(4) not to distribute any monetary or other sum to any beneficiaries until the determination of the probate action and or any further order of this Honourable Court.

(c) issue all necessary instructions to any solicitor(s) towards all pending actions which instructions would have been given by the deceased;

(iv) as *administrators pendente lite*, to submit an account of their administration of the estate within one month of the date of this order and thereafter every two months from the date of the previous submission by way of an affidavit and the same to filed in court and to be served on all parties in this action.

(v) that the *administrators pendente lite* engage all and any professionals to assist the administrators to act and pursue and resolve all and issues and make payment of all reasonable fees and expenses to these professionals.

(vi) that the *administrators pendente lite* pay all fees, and disbursements of all solicitors and or counsel appointed for the purposes of the defence of this suit.

(vii) that the remuneration of the *administrators pendente lite* be determined and/or approved by the court upon application by the administrators at the commencement of the administration and from time to time thereafter following each interval of accounting as envisaged in para. 3 above or as may be expedient;

(viii) the *administrators pendente lite* shall be indemnified of all outgoings incurred on behalf of the estate in the exercise of their powers and duties under this order to be paid out of the estate with the approval of the court;

(ix) the *administrators pendente lite* be at liberty to apply to court for any further or other orders and directions as may be appropriate or necessary;

(x) the costs of this application be taxed on a solicitor client basis and be paid out of the estate of the deceased;

(xi) liberty to apply; and

(xii) any further or other relief which this court deems appropriate and just.

Plaintiffs' Case

[23] The plaintiffs' counsel at the beginning of the hearing has objected to the appointment of *administrators pendente lite* based on the reasons that the appointment disclosed by the defendants are for collateral purposes, which are against the law and the objective of appointing *administrator pendente lite*. (See encl. 29 plaintiffs' written submissions para. 1.3).

[24] This objection was subsequently dropped by the plaintiffs' counsel after I have indicated to counsel that I am not amenable to grant any orders for the appointed *administrators pendente lite* to settle using the estate funds, without any scrutiny of court, any debts that were incurred by companies or entities or persons other than the deceased.

Hearing Of Enclosure 12 Before Me

[25] I heard counsel on 18 September 2023 and at the request of counsel, I adjourned my decision pending agreement on certain ancillary/consequential orders. However, parties could not reach an agreement.

[26] So, I continued hearing on 10 November 2023. After conclusion of hearing, I reserved my decision. At the request of counsel, I again fixed case management *via* e-review before Deputy Registrar on 16 November 2023 for parties to revert to court whether agreement can be reached on certain ancillary/consequential orders as set out in a revised draft of encl. 12, a copy of which is attached as Appendix B to the plaintiffs' further submission (see encl. 54).

[27] On 16 November 2023, the counsel informed my Deputy Registrar that parties still could not reach agreement on the said ancillary/consequential orders and requested me to deliver decision on encl. 12.

[28] These therefore are my grounds of judgment. I thank all the counsel for their thorough and helpful submissions which have greatly crystallised my thoughts.

Issues Before The Court

[29] As I see it, the issues before me are:

(i) whether the court should appoint *Administrators Pendente Lite*?

(ii) if yes, who should the court appoint as *Administrators Pendente Lite*?

(iii) whether the appointed *administrators pendente lite* are required to give security or administration bond? If yes, how much should the court set as the bond?

(iv) how should the court set the fees payable to the appointed *Administrators Pendente Lite*?

(v) should the court grant prayer 3[b] of encl. 12 as framed?

Issue 1 – Whether The Court Should Appoint Administrators Pendente Lite?

The Law

[30] The law on whether a court should or should not appoint an *administrator pendente lite* is well-settled in Malaysia. We have the recent 2020 decision of the Federal Court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 at paras. 20 and 21 and a 2021 decision by the Court of Appeal in *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2)* [2021] 1 CLJ 391; [2021] 2 MLRA 113.

[31] The following principles can be distilled from the decided cases.

[32] The appointment of an *administrator pendente lite* is made in Malaysia pursuant to s. 19 of the PAA. The relevant procedural rules are found under O. 72 r. 20 of the Rules of Court 2012 which deals with contentious probate proceedings. (See: *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2)* [2021] 1 CLJ 391; [2021] 2 MLRA 113).

[33] Section 19 of the PAA reads as follows:

> Letters of administration pendente lite.
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> 19. **Pending any probate action, letters of administration may be granted to such person as the court may appoint**, limited so that the administrator shall not be empowered to distribute the estate, and shall be subject to such control by and direction of, the court, as the court deems fit; and subject to that limitation the administrator so appointed shall have all the rights and powers of a general administrator.
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> (emphasis added)

[34] Order 72 r. 20 of the Rules of Court 2012 reads as follows:

> Administration pending trial (Order 72 rule 20)
>
> 20. (1) **An application under Section 19 of the Probate and Administration Act 1959 for the grant of administration may be made to the Registrar** by writ.
>
> (2) An administrator to whom a grant is made under s. 19 of the Act must, at the time when he begins proceedings for taxation of his costs, or at such other time as the Registrar may direct, produce at the Registry an account (verified by affidavit) of the moneys and other property received or paid or otherwise dealt with by him in his capacity as an administrator.
>
> (3) Unless the court otherwise directs, the account shall be referred to the Registrar for examination and the Registrar shall give such directions as may be necessary for examination of the administrator's costs.
>
> (4) Except where the remuneration of the administrator has been fixed by a judge, the Registrar shall, on the completion of the examination of the administrator's account, and taxation of his costs, assess and provide for the administrator's remuneration.
>
> (emphasis added)

[35] In *Tan Boon Thien & Anor*, S Nantha Balan JCA when affirming a High Court decision by Azimah Omar J in *Tan Poh Lee v. Tan Boon Thien & Anor* [2019] 1 LNS 2300 said as follows:

> [59] *The principle that is applicable when a court is called upon to exercise its discretion to appoint an administrator pendente lite is whether it has been shown that there is some proper object, some necessity, for making the appointment*. See: *Mohideen Batcha v. Fatimah Bee Alias Batcha Ammal* [1941] 1 MLRH 11. That burden naturally falls on the first respondent as the protagonist of the application (encl 6).
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> [60] *There is undoubtedly a spate of litigation and extreme animosity between the parties all arising out of and/or in connection with the impugned Will*, the Deed or the PA. Obviously, it will be quite some time before the dust of litigation settles.

> [61] *In the meanwhile, it is clear that there is a need to preserve the assets of the estate (including those assets which are disputed as to their title and/or ownership or rights attached thereto) and such preservation will pre-eminently be achieved by the appointment of an administrator pendente lite*.
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> [62] The *administrator pendente lite* is undoubtedly an officer of the court and is answerable for any omission or misconduct or wrongdoing, but that is a different matter altogether. The administrator is in fact subject to control of the court. If there is basis for contending that the appointee is unsuitable, the relevant party who has an issue is entitled to make the appropriate application and remove the appointee and have him/her replaced with another appointee.
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> (emphasis added)

[36] Similar sentiments have been expressed by courts in Australia and England.

[37] In *Re Griffin* [1925] Probate Division 38, Horridge J said:

> There is no absolute rule that a party to an action propounding a will cannot be appointed *administrator pendente lite* without the consent of all parties. The Court will make such an appointment when circumstances make it clearly desirable.

[38] The Supreme Court of Western Australia in *Fazio v. Naso* [2016] WASC 385 Master Sanderson also held at para. 10 that an administrator should be appointed as an estate should not be allowed "to drift while the parties squabble over which will should be propounded".

Application Of Law To Facts

[39] As stated earlier, the defendants who are executors of the impugned will have affirmed on oath that urgent decisions are required to manage the assets pending court resolution of the dispute over the validity of the impugned will with the plaintiffs. In the supporting affidavit encl. 13 exhs. L-11 and L-19 and from paras. 35 to 36.2.3, they have set out details of funding that they say is urgently required to be paid out from the estate of the deceased. (See also encl. 27 para. 18].

[40] In the present case, the plaintiffs' writ action is essentially to challenge the validity of the impugned will. The estate of the deceased is huge by any standards. The estimated value of the deceased's estate is about RM1.6 billion according to the plaintiffs.

[41] Pending trial in February 2024, it is also necessary to deal with claims against the estate and to preserve the assets of the estate and such preservation will pre-eminently be achieved by the appointment of *administrators pendente lite*.

[42] During the course of submissions, learned counsel for the plaintiffs. Dato' V Sithambaram after hearing my view as stated above eventually agreed to the appointment of *administrators pendente lite*.

[43] In conclusion, on issue 1, I am of the view that the appointment of *administrators pendente lite* is not only proper but necessary in the interest of the plaintiffs, the defendants as well as the beneficiaries of the estate.

Issue 2 – If The Court Should Appoint Administrators Pendente Lite*, Who Should The Court Appoint?*

Should The Court Appoint A Neutral Person?

[44] On this issue, the lead learned counsel for the plaintiffs, the first and second defendants respectively agreed to the appointment of one *administrator pendente lite* nominated by the plaintiffs and one *administrator pendente lite* nominated by the defendants.

[45] As to who I should appoint, learned counsel eminently disagreed.

[46] Tan Sri Cecil Abraham lead counsel for the first defendant argues that the court can appoint a person related to the litigants to be the *administrator pendente lite*. He cites the Supreme Court of Western Australia case of *Fazio v. Naso* [2016] WASC 385 where Master Sanderson at para. 11 agreed to the appointment of the plaintiff as administrator. See encl. 33 para. 70.

[47] Thus, he puts forward his client and the second defendant as the first choice and as second choice Dato' S Satharuban an advocate and solicitor. For the nomination of the plaintiffs, he accepts any representative from Deloitte put forward by the plaintiffs.

[48] However, ultimately, he concedes that I have the discretion on who to appoint. This can be seen from his written submissions in encl. 27 submissions of the defendants which reads:

> 28. The Defendants have proposed themselves and two others as interim Administrators to be appointed. The Plaintiffs have opposed the appointment of an interim Administrator. In the alternative, the Plaintiffs propose an alternate Administrator.
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> 29. **Therefore, this Court can, in its discretion, allow the application and appoint any of the persons or more than interim Administrators**.
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> (emphasis added)

[49] Mr Ong Yu Jian, who is the lead counsel for the second defendant, put forward as his client's first choice the two defendants. For the second choice, his client puts forward Dato' S Satharuban and Tan Chil Kin who is a chartered accountant. (See encl. 12 prayers 1 and 2 and further submission of the second defendant encl. 55 para. 3).

[50] Learned lead counsel for the plaintiffs, Dato' V Sithambaram, put forward as his clients' choices Khoo Siew Kiat from Deloitte Restructuring Services PLT and Dato' S Satharuban. (See encl. 41 letter from Sitham & Associates dated 20 September 2023 to Avinder Gill Chambers).

The Criteria For The Appointment Of *Administrator Pendente Lite*

[51] In my view the court should appoint a neutral person to be the *administrator pendente lite*. Unless there is a good reason, a person who is an executor of a disputed will, a beneficiary or a person who has an interest in the assets of the estate or is a litigant in the probate litigation should not be appointed as the *administrator pendente lite*.

[52] The Federal Court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 on the appointment of a neutral person to be the *administrator pendente lite* said:

> [20] Apart from the abovementioned, during the pendency of a suit pertaining to the validity of a will, the court may issue letters of administration pendente lite particularly where the executor is unable to act, or there is no executor or administrator at all, and the validity of the will or the estate is very much in question. In such circumstances, it is absolutely necessary that the administrator be appointed to essentially preserve the assets of the estate, "pending the litigation", or in Latin, pendente lite. **The parties typically agree on a neutral person to be appointed as *administrator pendente lite* and a court application is made for such an order**. Such administrator has all the rights and powers of a general administrator, other than the right to distribute the estate assets. He is very much subject to the control of the court, and acts under its direction, and the authority of s. 19 of the Probate Act 1959. The purpose of this appointment is to provide interim administration of the estate until the action has been concluded, and basically nothing else. Once the action has been concluded, this grant will cease, either upon the will being proved and probate granted, or upon the will being set aside and letters of administration granted in its place.
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> [21] A person who is appointed as an administrator or an executor is the personal representative of the estate of the deceased person (s. 2 of the Probate Act 1959). As a personal representative, he has the same powers to sue in respect of all causes of action that survive the deceased (s. 59 of the Probate Act 1959). An administrator is required to hold the immovable property of the estate upon trust, subject to sanction of the court, to sell the same. He also holds the movable property on trust to call in, sell and convert into money (s. 68 of the Probate Act 1959).
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> (emphasis added)

[53] The same point of neutrality was also stressed by the Court of Appeal in *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2)* [2021] 1 CLJ 391; [2021] 2 MLRA 113 *via* S Nantha Balan JCA who held:

> [64] Essentially, the learned judge was impelled to the view, without making a determination one way or the other as to who was telling the truth, that in light of the spate of litigation that was extant and given the deep animosity and venomous and vitriolic relationship that exists between the parties, the assets of the estate of the deceased (disputed and undisputed) had to be preserved and managed.

A [65] Since the affairs of the estate such as payment of taxes, collection of rentals, renewal or termination of tenancies etc have to be handled, *it was (is) urgent, imperative and wholly necessary to appoint a third party neutral person to handle the assets and affairs of the estate of the deceased until such time that a determination is made one way or the other in the probate action with regard to the validity of the impugned Will*, the Deed and the PA.

B [66] On that analysis, we did not see any flaw or misdirection in the approach that was taken by the learned judge. We found no appealable error in the grounds of judgment of the learned judge and we were not satisfied that the learned judge was in any sense "plainly wrong" in the exercise of her discretion to make the Order for the appointment of the C administrator pendente lite.

(emphasis added)

[54] The Supreme Court of Queensland in *Hempseed v. Ward & Anor* [2013] QSC 348 also favoured the appointment of a neutral person. The court said:

D [15] The most comprehensive examination of the question of whether a party to the dispute ought be appointed *administrator pendente lite* that I have been referred to is to be found in the judgement of Cox J in *Tomkinson v. Hersey* (1983) 34 SASR 181. Cox J concluded:

> It is hardly surprising that the textbooks and the few reported decisions on the question are generally opposed to the notion of E appointing as an *administrator pendente lite* someone who is personally and actively involved in the lis itself. The desirability of having the estate administered by someone who stands quite outside the litigious battle is obvious. The cases support the Acting Master's conclusion that, *as a general rule, a person unconnected with the action is the most suitable person to be appointed as administrator* F *pendente lite*.

[16] Cox J determined that *the circumstances would need to be "quite exceptional" for a party to the lis to be appointed as administrator*. In response to the arguments put to him Cox J said:

> G To follow the established and, in my view, sound practice of not making such an appointment unless the case is an exceptional one is not to prejudge the issue between litigants or to reflect in any way upon the good name of the applicant. It is merely to ensure that the administrator remains aloof from the court proceedings and indifferent to the outcome.

H [17] As Cox J observed the two decisions cited in the texts where executors have been appointed as administrators pendente lite - *Re Griffin and Wright v. Rogers* – do not necessarily contradict this approach. The plaintiff here did not advance any other examples to support his application.

I [18] Re Griffin involved a timber business. The testator's widow had been managing the business as receiver under a lunacy order prior to the testator's death. It was necessary for someone to carry on the business until the action could be disposed of. The widow was appointed

administrator pendente lite even though she was a party to the action. Cox J pointed out that the decision "may be interpreted, at least in part, as an application of the principle stated in *Northey v. Cock*, namely the Court will not generally, by an administration order, take property out of the hands of a litigant party who was actually and lawfully in possession of it."

[19] In *Wright v. Rogers* there was no positive opposition to the appointment of executors as administrators. Here there is opposition to the appointment of executor. As well in Wright, the appointment was sought after determination of the issue by the primary judge and so the executor had established a right to take in the assets and deal with them. That right was in question by reason of an appeal of the primary decision and it was only in respect of the period pending determination of the appeal that the executor was expected to act as administrator. The circumstances were very different to those here.

[20] Cox J's decision was referred to with approval by Anderson J in *Henderson v. Executor Trustee Australia Ltd* [2005] SASC 477 at [122]. So far as I am aware it has never been disapproved. I accept his Honour's exposition of the law as accurate.

[21] The question then is whether the various matters that the executor relies on for his appointment put this case into the category of "quite exceptional". In my view they do not, whether taken singly or together. I point out that in some respects the same factors were relevant in *Tomkinson v. Hersey and Cox J took the same view there. A modest increase in expense and the fact that the executor was executor under each of the disputed wills were not considered sufficient by him to justify the appointment of a party to the litigation as administrator pendente lite*.

(emphasis added)

[55] Based on the cases set out above, I cannot and should not appoint the plaintiffs or the defendants to be *administrators pendente lite* as they are not neutral parties in the writ action. The case of *Fazio v. Naso* [2016] WASC 385 relied on by the defendants where the court appointed the plaintiff there to be the administrator is, with respect, should be confined to the peculiar facts of that case. It should not be considered as stating the general default position.

[56] I will also appoint one nominee each from the two camps to ensure neutrality and checks and balances in the decision-making process.

[57] I therefore appoint as *administrators pendente lite* the defendants' nominee Dato' S Satharuban who is an advocate and solicitor and the plaintiffs' nominee Khoo Siew Kiat from Deloitte Restructuring Services PLT.

[58] I will also in my decision provide for the *administrators pendente lite* to apply to court for directions in the event the two *administrators pendente lite* cannot agree on any issue.

Issue 3 - Whether The Appointed Administrators Pendente Lite Are Required To Give Security Or Administration Bond? If Yes, How Much Should The Court Set As The Bond?

Defendants' Contention

Reliance On The Order Made In *Tan Boon Thien & Anor v. Tan Poh Lee & Ors* [2021] 2 MLRA 113 CA

[59] The lead counsel for the first defendant relies on the order made by the High Court and affirmed by the Court of Appeal in *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2)* [2021] 1 CLJ 391; [2021] 2 MLRA 113 CA. The said order, among others, appointed an *administrator pendente lite* without requiring the giving of security or an administration bond. This is clear from this extract of the court of appeal's judgment:

> [14] The Order reads as follows:
>
> 1. Mr Lim Tian Huat ("LTH") of Messrs Rodgers Reidy & Co, Chartered Accountants (AF: 001974) ("RR&Co") be appointed, **without giving security and/or an administration bond**, as *administrator pendente lite* of the estate of Tan Kim Choo @ Tan Kim Choon (NRIC No 410628- 14-5101) ("the estate") pending determination of the probate action above or until further order of this court;
>
> (emphasis added)

[60] A close scrutiny of both the High Court's and Court of Appeal's grounds of judgment shows that the requirement of a bond was never discussed by the High Court or the Court of Appeal. It was not an issue put forward for the courts there to decide.

[61] I therefore do not accept the submission of counsel for the defendants that *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2)* [2021] 1 CLJ 391; [2021] 2 MLRA 113 CA is clear authority for the proposition that a bond need not be provided by an *administrator pendente lite*.

[62] However, I can accept that if the two courts in *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (No 2)* [2021] 1 CLJ 391; [2021] 2 MLRA 113 CA feel strongly that a bond is required to be provided by the *administrator pendente lite* they would have commented on it.

Reliance On The Difference Between Section 19 And Section 35 Of The PAA

[63] The counsel for the defendants also contends that s. 19 of the PAA does not state that a bond must be provided by an *administrator pendente lite*, unlike s. 35 of the PAA which states that a bond must be provided by an administrator.

[64] Section 19 of the PAA reads as follows:

> Letters of administration pendente lite.
>
> 19. Pending any probate action, letters of administration may be granted to such person as the court may appoint, limited so that the administrator shall not be empowered to distribute the estate, and shall be subject to such control by and direction of, the court, as the court deems fit; and subject to that limitation the administrator so appointed shall have all the rights and powers of a general administrator.

[65] Section 35 of the PAA reads as follows:

> (1) *Unless the Court in any particular case otherwise orders*:
>
> (a) *in the case of administrations*, whether with or without will annexed, *the person to whom the grant is made* or on whose behalf it is sealed *shall give security for the due administration of the estate*:
>
> (b) *no security shall be required where the gross value of the estate does not exceed fifty thousand ringgit*.
>
> (2) *The security shall ordinarily be by bond* in the prescribed form by the grantee and two sureties, in the amount at which the estate within the jurisdiction is sworn without deduction of any debts due by the deceased, other than debts secured by mortgage or charge; but the court may for any sufficient reason increase or decrease the number of sureties or dispense with them. and may reduce the amount of the bond and the Court in exercising its discretion shall consider the standing of the parties, the nature of the property. The amount of the debts and the extent of the administrator's personal interest in the distributive share of the estate.
>
> (emphasis added)

[66] In further support, the defendants' counsel also say that in the UK the need to give a bond by an *administrator pendente lite* is expressly provided in a UK Practice Direction (Chancery Division) dated 30 July 1971 reported in [1971] 3 All ER 327. The defendants' counsel says such a Practice Direction has not been issued in Malaysia.

Court's Analysis

[67] In my view a bond should not be imposed by me. Such a requirement is not stated in s. 19 of the PAA (which applies to *administrator pendente lite*) unlike s. 35 of the PAA (which applies to administrator). It is not for the court to read in words that are not stated in a statute. Parliament must have their reason. It is not for the court to legislate.

[68] In Malaysia, unlike in the UK, there is also no practice direction issued by the rules committee that a bond is to be provided by an *administrator pendente lite*.

[69] In *Noraini Omar & Anor v. Rohani Said & Another Appeal* [2006] 1 CLJ 895; [2006] 1 MLRA 117, Arifin Zakaria JCA said:

> It is a cardinal principle of the interpretation of statutes that the court should look first to the words of the statute itself, and if these words are plain, it is not permissible to consider what was the intention of the statute or the previous history of the law.

Issue 4 – How Should The Court Set The Fees Payable To The Appointed Administrators Pendente Lite?

[70] The answer is provided in O. 72 r. 20 of the Rules of Court 2012 which reads as follows:

> Administration pending trial (Order 72 rule 20)
>
> 20. (1) An application under s 19 of the Probate and Administration Act 1959 for the grant of administration may be made to the Registrar by writ.
>
> (2) An administrator to whom a grant is made under s 19 of the Act must, at the time when he begins proceedings for taxation of his costs, or at such other time as the Registrar may direct, produce at the Registry an account (verified by affidavit) of the moneys and other property received or paid or otherwise dealt with by him in his capacity as an administrator.
>
> (3) Unless the court otherwise directs, the account shall be referred to the Registrar for examination and the Registrar shall give such directions as may be necessary for examination of the administrator's costs.
>
> (4) *Except where the remuneration of the administrator has been fixed by a judge, the Registrar shall, on the completion of the examination of the administrator's account, and taxation of his costs, assess and provide for the administrator's remuneration.*
>
> (emphasis added)

[71] Therefore, as set in O. 72 r. 20 of the Rules of Court 2012 the *administrators pendente lite* shall produce at the Registry an account (verified by affidavit) of the money and other property received or paid or otherwise dealt with by them in their capacity as *Administrators Pendente Lite*. The account shall be examined by the Registrar who shall give such directions as may be necessary for the examination of the *Administrators Pendente Lite*'s costs. The Registrar shall, on the completion of the examination of their account, and taxation of their costs, assess and provide for the *Administrators Pendente Lite*'s remuneration.

Issue 5 - Should The Court Grant Prayer 3[b] Of Encl. 12 As Framed?

Submissions Of The Defendants

[72] Prayer 3[b] of encl. 12 reads:

> That the following directions be made as to the Administration of the estate pending the determination of this probate action to preserve the estate and all its assets and liabilities, namely that the *Administrators Pendente Lite*, their servants and or agents shall:

(a) …

(b) Collect, receive and place monies currently held in various bank accounts in Malaysia in the name of the deceased, … such account to be identified to be held as Trustees of the estate of the deceased, Lim Siew Kim, *with instructions that all* Administrators Pendente Lite*, shall, at all times consent and approve, payments to be made out of this account jointly for the sole purpose of financial support to estate companies and/or properties on a needs be basis* (hereinafter referred to as 'the Trust Account');

(emphasis added)

[73] The defendants contend that prior to the death of the deceased, the deceased has financed various companies (under her control and/or in which she was the biggest shareholder); and properties (not under her name] including paying all bills and outgoings and legal costs that were incurred for all proceedings that were being pursued or defended by these companies. (See: encl. 27 paras. 35 to 42.5).

[74] The defendants want me to make the order, that is set out in encl. 12 prayer 3[b] highlighted in bold by me above, that the appointed *administrators pendente lite* shall continue to make payments out of the estate to settle the debts of these estate companies and/or properties and provide for their operations costs and expenses. In short, the defendants urged me to lift the corporate veil to treat all these companies and properties as part of the estate of the deceased.

Plaintiffs' Contention

[75] The plaintiffs disagree with the defendants. The plaintiffs say that these companies being separate legal entities have their own directors who can make decisions.

My Analysis

[76] I start with the basic proposition that a company is a separate legal entity in law. It is distinct from its members, shareholders and directors. The liability of a company is not the liability of its members, shareholders or directors. (See: *Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 4 CLJ 1; [2023] 3 MLJ 503 at pp. 517 & 518; *ARL Associates Sdn Bhd & Ors v. Bank Kerjasama Rakyat Malaysia Bhd* [2012] 1 LNS 821; [2012] MLJU 1450 and *Sara Yasmin Sekh Mohd Ruzi v. Hamaludin Ali & Ors* [2022] 1 LNS 619; [2022] MLJU 522).

[77] In my view, whether or not the estate should continue the alleged practice of the deceased is a decision that is best left to the appointed *Administrators Pendente Lite*. I would prefer they study each debt of these companies and statutory fees payable for the properties based on inputs from the directors concerned.

[78] It is not in the estate's or beneficiaries' interests that the court gives a blank cheque to settle these debts or statutory charges. In fact, I would think if the appointed *administrators pendente lite* have any doubts on any payments requested from them, that they should come back to court and the court can decide after hearing the views of the litigants here.

[79] I therefore will not grant prayer 3[b] as drafted but will grant the prayer in a modified form for the reasons stated above.

Decision

[80] For the above reasons, I make the following orders:

(i) that Dato Satharuban Sivasubramaniam, an Advocate and Solicitor of the High Court of Malaya and Khoo Siew Kiat from Deloitte Restructuring Services PTL, a chartered accountant, an approved auditor and liquidator, be jointly appointed *administrators pendente lite* of the estate of Lim Siew Kim, deceased (NRIC: 481024-10-5502) ('deceased') pending the determination of the writ action or until further order of this court;

(ii) the following directions as to the administration pending the determination of the writ action be made to preserve the estate and all its assets, namely that the *administrators pendente lite*, their servants and or agents shall:

(a) identify, collect, receive and manage all the assets of the estate but not to distribute any assets or proceeds therefrom to any of the beneficiaries of the estate of the deceased pending the determination of the writ action or until further order of this court;

(b) collect, receive and place monies currently held in various bank accounts in Malaysia or elsewhere in the name of the deceased, whether in current accounts or fixed deposits or savings accounts and to place the same in a joint current account of the *administrators pendente lite*, such account to be identified to be held as trustees of the estate of the deceased, Lim Siew Kim ("trust account");

(c) issue all necessary instructions to any solicitor(s) towards all pending actions where the deceased's estate is a party;

(d) pay all lawful debts of the estate, including to identify all creditors of the estate and to enter into any compromise or settlement with the same out of the assets of the estate;

(e) the *administrators pendente lite* do file in court an account of their administration of the estate (including an account of all monies withdrawn from the trust account and to explain the purpose and quantum of such payments) within one month of the date of this order and thereafter every two months from the date of the previous submission by way of an affidavit and the same to be filed in court and to be served on the solicitors of all parties in this action;

(iii) the *administrators pendente lite* shall be at liberty to apply to court for such further orders and directions as may be appropriate or necessary;

(iv) the *administrators pendente lite* shall be at liberty to apply to court for further orders and directions in the event they cannot agree on any issue.

(v) the *administrators pendente lite* need not provide any security or administration bond.

(vi) as set in O. 72 r. 20 of the Rules of Court 2012 the *administrators pendente lite* shall produce at the Registry an account (verified by affidavit) of the moneys and other property received or paid or otherwise dealt with by them in their capacity as *administrators pendente lite* within one month of the date of this order and thereafter every two months from the date of the previous submission. The account shall be examined by the Registrar who shall give such directions as may be necessary for the examination of the *administrators pendente lite*'s costs. The Registrar shall, on the completion of the examination of their account, and taxation of their costs, assess and provide for the *administrators pendente lite*'s remuneration;

(vii) costs in the cause; and

(viii) liberty to apply.